



## *Performance Assessment In Courts - The Swiss Case - Constitutional Appraisal And Thoughts As To Its Organization*

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### Abstract:

Performance assessment has become commonplace in management, even in the public sector. With the increasing pressure on courts to perform while making efficient use of resources, performance assessments in the justice system are also gaining in importance. However, the need for judicial independence poses special challenges for performance assessments in courts.

Against this background, this article conducts a constitutional appraisal, and contrasts the need for judicial independence with the principles governing effectiveness and efficiency, self-government and supervision, and appointment and re-appointment. A duty to guarantee justice can be derived from this, that in principle, does not exclude the performance assessment of judges, but even renders it essential, subject to compliance with certain requirements.

In these circumstances, it seems hardly surprising that numerous countries conduct performance assessments of judges and that various international institutions have developed principles for this purpose, a summary of which is presented. In Switzerland's case this is based on a recently conducted survey.

In the field of conflict between guaranteeing justice and protecting the judiciary, the following key questions arise in particular:

- What is the purpose of performance assessments and what are the consequences?
- What is subjected to a performance assessment and what are the assessment criteria?
- How is performance recorded as the basis for the performance assessment?
- Who is subjected to a performance assessment, and must a distinction be made between judges in higher and lower courts?
- Who carries out the performance assessment and what methods of protecting one's rights are available?
- Who should receive the results of the performance assessment?

This contribution sketches out possible answers to these key questions and aims to encourage academics and practitioners to give further consideration to this subject.

**Keywords:** performance assessment, judicial independence, effectiveness and efficiency, self-government, supervision

### 1. Introduction

Courts have recently found themselves under an increased pressure to perform, and there are several reasons for this: the workload is rising, whereas the available resources are limited.<sup>2</sup> The quality of the justice system is increasingly being

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<sup>2</sup> A. Lienhard et al., *Stand des Justizmanagements in der Schweiz*, Schriftenreihe zur Justizforschung Vol. 1, 2013, p. 3 f., with further references; R. Klopfer, 'Management der Justiz – Richterbild im Wandel', 2007 *Richterzeitung*, no. 2, para. 17

(<<http://richterzeitung.weblaw.ch/rzissues/2007/2/r318.html>> (last visited 20 October 2014)). In Germany, two thirds of judges admit that they have insufficient time to deal with their cases (G. Kirchhoff, 'Die Belastung von Richtern und Staatsanwälten ist zu hoch und ein Gefahr für den Rechtsstaat', 2014 *Richterzeitung*, no. 2, para. 3 [<[http://richterzeitung.weblaw.ch/rzissues/2014/2/die-belastung-von-ri\\_a6e0832bb5.html](http://richterzeitung.weblaw.ch/rzissues/2014/2/die-belastung-von-ri_a6e0832bb5.html)> (last visited 20 October 2014)]).

discussed and questioned<sup>3</sup> by the authorities responsible for the supervision and (re-) appointment of judges.<sup>4</sup> Judges are also becoming the subject of assessment.<sup>5</sup> Judicial performance is compared through rankings<sup>6</sup> and judicial activity is critically debated by politicians and the media.<sup>7</sup> The demands for court management have risen accordingly.<sup>8</sup>

In many areas of public administration, performance assessment has become a fixed date on the management calendar and is a crucial element of quality assurance and development.<sup>9</sup> The performance of each authority is recorded and evaluated in reports (such as public office annual reports). In addition, performance records (for example, course evaluations) are also kept and performance assessments (in particular staff appraisal interviews) are undertaken at employee level.

This inevitably raises the question of whether and how judicial performance can and should be assessed. In particular the performance of judges is singled out as an issue. This has been a topic of discussion in Switzerland for some time<sup>10</sup> and was recently the subject of an international conference of the Swiss Judges' Association (Schweizerische Vereinigung der Richterinnen und Richter, SVR)<sup>11</sup>. The importance and current relevance of the topic was underlined by a recent decision not to re-appoint a supreme court judge due to perceived shortcomings in his working methods and organisation.<sup>12</sup> In the canton of Lucerne, a change to cantonal law has given rise to a debate on the principles for deciding who should be appointed as a judge.<sup>13</sup> The canton of Geneva's new constitution even contains the following regulation: 'Before each appointment to the judiciary, the Magistrates Supervisory Council shall evaluate the qualifications of the candidates. It shall prepare a preliminary opinion.'<sup>14</sup>

The following paper addresses the question of the performance assessment of judges from the point of view of constitutional law. It also considers developments abroad and recent empirical findings.

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<sup>3</sup> S. Gass, 'Professionalisierung des Richteramts', 2010 *AJP*, p. 1149; H. Wiprächtiger, 'Recht und Richter', in P. Tercier et al. (eds.), *Festschrift für Peter Gauch*, 2004, p. 327; C. Bandli, 'Die Rolle des Bundesverwaltungsgerichts', in P. Tschannen (ed.), *Neue Bundesrechtspflege, Auswirkungen der Totalrevision auf den kantonalen und eidgenössischen Rechtsschutz*, 2007, p. 195 ff. and p. 205 f., with further references.

<sup>4</sup> A. Lienhard, 'Oberaufsicht und Justizmanagement', 2009 *Richterzeitung*, no. 1, para. 71 ff.

(<<http://richterzeitung.weblaw.ch/rzissues/2009/1/r587.html>> (last visited 20 October 2014)).

D. Grosse, 'Assessmentcenter für Richter', *Legal Tribune online*, 31 May 2013 (<[www.lto.de/recht/job-karriere/j/assessmentcenter-richter-gerichte](http://www.lto.de/recht/job-karriere/j/assessmentcenter-richter-gerichte)> (last visited 20 October 2014)).

<sup>6</sup> See for example the comparative studies by the European Commission for the Efficiency of Justice (CEPEJ) 2010 and 2012 (also see J. Bühler, 'Die Schweizer Gerichte im europäischen Vergleich', 2011 *Richterzeitung*, no. 2

[<<http://richterzeitung.weblaw.ch/rzissues/2011/2/r928.html>> (last visited 20 October 2014)]), the study The Economics of Civil Justice the OECD, New Cross-Country Data and Empirics (OECD 2013 No. 1060) and the EU Justice Scoreboard 2013 from the European Commission (on the EU Justice Scoreboard: 'EU-Kommission stellt Analyse der Justizsysteme der Mitgliedstaaten auf breitere Grundlage', 2013 *Richterzeitung*, no. 2 [<<http://richterzeitung.weblaw.ch/rzissues/2013/2/2261.html>> (last visited 20 October 2014)]).

<sup>7</sup> H. P. Walter, 'Interne richterliche Unabhängigkeit', 2005 *Richterzeitung*, no. 1, para. 29

(<<http://richterzeitung.weblaw.ch/rzissues/2005/1/r3.html>> (last visited 20 October 2014)); U. Zimmerli, 'Wenn die Politik Druck macht – Richtertätigkeit unter Beeinflussungsversuchen', 2009 *Richterzeitung*, no. 4

(<<http://richterzeitung.weblaw.ch/rzissues/2009/4/r700.html>> (last visited 20 October 2014)); S. Gass & P. Stolz, 'Institutionen der Richterkontrolle im internationalen Vergleich', 1998 *SJZ*, p. 128; see also the 'Court Test' in the *Beobachter* magazine from 22 June 2001 (*Beobachter* 13/2001).

<sup>8</sup> M. Meisenberg, 'Die Justiz als modernes Dienstleistungsunternehmen', in R. Böttcher et al. (eds.), *Festschrift für Walter Odersky zum 65. Geburtstag*, 1996, p. 61 ff.

<sup>9</sup> See for example, N. Thom & A. Ritz, *Public Management, Innovative Konzepte zur Führung im öffentlichen Sektor*, 2008, p. 339 ff.; K. Schedler & I. Proeller, *New Public Management*, 2011, p. 257 f.

<sup>10</sup> See already D. Kettiger, 'Auf dem Weg zu einer leistungs- und wirkungsorientierten Justiz: Erkenntnisse – offene Fragen – Ausblick', in D. Kettiger (ed.), *Wirkungsorientierte Verwaltungsführung in der Justiz – ein Balanceakt zwischen Effizienz und Rechtsstaatlichkeit*, SGVW-Volume no. 44, 2003, p. 189 f., with further references.

<sup>11</sup> Richterliche Unabhängigkeit und Leistungsbeurteilung – Die Beurteilung richterlicher Tätigkeit im Spannungsverhältnis zur richterlichen Unabhängigkeit, *Internationale Tagung der Schweizerischen Vereinigung der Richterinnen und Richter* (SVR), 23 May 2013.

<sup>12</sup> *Aargauer Zeitung*, 23 August 2013.

<sup>13</sup> Bill for consultation dated 21 January 2013, p. 13 f.; *Motion No. 740 of 14 September 2010* on improving the basis for decision-making in appointing judges (Minutes of the Cantonal Parliament Lucerne 2011, p. 1667 f.); *Motion No. 406 of 9 September 2013* on the qualification and performance assessment of judges and public prosecutors as the basis for re-appointment and increasing workloads. See Schweizerische Vereinigung der Richterinnen und Richter (SVR), Consultation Procedure, 'Gesamtrevision der Geschäftsordnung des Kantonsrats etc.', 25 April 2014, and T. Stadelmann, 'Überlegungen zur Wahl und Wiederwahl von Richterinnen und Richtern, Kritische Anmerkungen anlässlich eines Gesetzgebungsprojekts im Kanton Luzern', 2014 *Richterzeitung*, no. 3 (<[http://richterzeitung.weblaw.ch/rzissues/2014/3/uberlegungen-zur-wahl\\_14215af798.html\\_\\_ONCE](http://richterzeitung.weblaw.ch/rzissues/2014/3/uberlegungen-zur-wahl_14215af798.html__ONCE)> (last visited 20 October 2014)).

<sup>14</sup> Art. 127 Constitution of the Republic and Canton of Geneva of 14 October 2012 (KV-GE, SR 131.234).

## 2. Constitutional Context<sup>15</sup>

### 2.1. Requirements

Courts and their judges are expected to perform appropriately and efficiently, and judicial performance is partly guaranteed by the prohibition of judicial delays and the requirement of prompt procedures contained in Article 29 Paragraph 1 of the Swiss Federal Constitution, according to which judgments must be issued within a reasonable time.<sup>16</sup> At the same time, basic procedural rights must be respected, particularly the right to an impartial court (Article 30 Paragraph 1 Federal Constitution) and the right to a fair hearing, which includes the requirement to provide adequate justification for any decision (Article 29 Paragraph 2 Federal Constitution).<sup>17</sup> In addition to these procedural (formal) aspects of the judicial process, court decisions are expected to be of a high content-related (material) quality: judgments should guarantee legal protection and contribute to legal harmony<sup>18</sup>; the practices of the supreme courts should also function as a guide and as an example for legal development.<sup>19</sup>

This touches on the effectiveness and efficiency of the justice system<sup>20</sup>, qualities that must be considered in relation to all state tasks (cf. at federal level Article 43a Paragraph 5, Article 170 Federal Constitution).<sup>21</sup> Even courts have only limited resources – despite the fact that the need for sufficient financial support is constantly being reiterated.<sup>22</sup> Therefore the need to use the available funds economically becomes more important, just as it is with the entire national budget (see at federal level Article 126 Paragraph 1 Federal Constitution).

Judicial performance and economy are, when taken with legality, the main criteria applied in supervision.<sup>23</sup> This applies first of all to parliamentary oversight (at federal level Article 169 Paragraph 1 Federal Constitution)<sup>24</sup>; the control over the content of individual judgments is out of the question and oversight is limited in principle to court management.<sup>25</sup> However,

<sup>15</sup> The reference relates to the Federal Constitution. The cantonal constitutions have increasingly analogous provisions, where the federal constitutional law does not apply in any case to the cantons as well. In some cases the framework is also marked out in international law, e.g. in the ECHR and in UN Covenant II. On the international discussion, see for example P. Albers, *Performance indicators and evaluation for judges and courts*

(<[http://www.coe.int/T/dghl/cooperation/cepej/events/onenparle/MoscowPA250507\\_en.pdf](http://www.coe.int/T/dghl/cooperation/cepej/events/onenparle/MoscowPA250507_en.pdf)> (last visited 20 October 2014)); R. Mohr & F. Contini, 'Judicial Evaluation in Context: Principles, Practices and Promise in Nine European Countries', 2007 *European Journal of Legal Studies*, Vol. 1, no. 2 (<<http://www.ejls.eu/2/30UK.htm>> (last visited 20 October 2014)).

<sup>16</sup> Excessively long proceedings reduce both the legal protection afforded to the parties to the proceedings and to third parties. Avoiding excessively long proceedings is therefore a feature of a good judge (see for example K. Rennert, 'Was ist ein guter Richter? – Fünfzehn Thesen für eine Annäherung', 2013 *DRiZ*, no. 6, p. 216. More recently on the issue, see B. Brändli, *Prozessökonomie im schweizerischen Recht, Grundlagen, bundesgerichtliche Rechtsprechung und Auswirkungen im schweizerischen Zivilprozess*, 2013, in particular p. 21 ff. as well as C. Bürki, *Verwaltungsjustizbezogene Legalität und Prozessökonomie*, 2013, in particular p. 128 ff.; Kettiger, note 10, p. 200).

<sup>17</sup> For an overview of the constitutional procedural guarantees see for example G. Steinmann, in B. Ehrenzeller et al. (eds.), *St. Galler Kommentar* zu Art. 29 BV, para. 4 ff., 2014.

<sup>18</sup> G. Biaggini, '§ 73 Rechtsprechung, para. 1', in J.-F. Aubert et al. (eds.), *Verfassungsrecht der Schweiz*, 2001; Kettiger, note 10, p. 201; R. Kiener, 'Das Bundesgericht und weitere richterliche Behörden', in G. Biaggini et al. (eds.), *Staatsrecht*, 2011, p. 252; H. Koller, in M. A. Niggli et al. (eds.), *Basler Kommentar* zu Art. 1 BGG, para. 14, 2011.

<sup>19</sup> See for example Biaggini, note 18, para. 1 and para. 34.

<sup>20</sup> See A. Lienhard, 'Controllingverfahren des Bundesgerichts', 2007 *Richterzeitung*, no. 2, para. 4

(<<http://richterzeitung.weblaw.ch/rzissues/2007/2/r300.html>> (last visited 20 October 2014)); *ibid.*, note 4, para. 29 f. See also for example Kettiger, note 10, p. 199 ff.; E. Poltier, 'L'organisation et le fonctionnement interne de l'ordre judiciaire et des tribunaux', 2011 *AJP*, p. 1020; N. Raselli, 'Richterliche Unabhängigkeit', 2011 *Richterzeitung*, no. 3, para. 19

(<<http://richterzeitung.weblaw.ch/rzissues/2011/3/r972.html>> (last visited 20 October 2014)); T. Stadelmann, 'Richterliche Unabhängigkeit und Leistungsbeurteilung', 2013 *Richterzeitung*, no. 1, para. 1

(<<http://richterzeitung.weblaw.ch/rzissues/2013/1/2246.html>> (last visited 20 October 2014)). The requirement of efficiency of the courts and of judges is also stressed with reference to Art. 6 ECHR by the Committee of Ministers of the Council of Europe in of its recommendation dated 17 November 2010 *On judges: independence, efficiency and responsibilities* (Recommendation CM/Rec[2010]12; see 2011 *Richterzeitung*, no. 3

[<<http://richterzeitung.weblaw.ch/rzissues/2011/3.html>> (last visited 20 October 2014)]).

<sup>21</sup> See also J.-M. Doogue et al., *Accountability for the Administration and organisation of the Judiciary*, Paper presented to the Asia Pacific Courts Conference, 2013, p. 10.

<sup>22</sup> Raselli, note 20, para. 31; P. Guidon, 'Von der gleichmässigen Verteilung von Enttäuschungen', 2013 *Richterzeitung*, no. 1

(<<http://richterzeitung.weblaw.ch/rzissues/2013/1/2092.html>> (last visited 20 October 2014)); BGE 107 Ib 160 E. 3c, p. 165.

<sup>23</sup> Lienhard, note 4, para. 15 f.

<sup>24</sup> In relation to judicial councils (equipped with various powers), see Lienhard, note 4, para. 22, with further references.

<sup>25</sup> Lienhard, note 4, para. 8 ff., with numerous further references; Kiener, note 18, p. 276 f.; Kiener, 'Aspekte der parlamentarischen Justizaufsicht im Kanton Bern', 1997 *BVR*, p. 394 ff.; P. Stolz & S. Gass, 'Kontrolle und Bewertung von Richterarbeit aus rechts- und wirtschaftswissenschaftlicher Sicht', 1996 *recht*, no. 5, p. 170 f.; T. Sägger, in M. Graf et al. (eds.), *Parlamentsrecht und Parlamentspraxis der Schweizerischen Bundesversammlung*, Kommentar zu Art. 26 ParlG, para 56 f., 2014.

judicial performance is a significant element in general procedural matters. The oversight authority must investigate whether the courts generally comply with their constitutional duty and whether they efficiently use the available resources in the judicial process. The oversight authority or its advisory committees must be allowed to look into judge-related matters (such as the number of cases dealt with by individual judges) where there are multiple, objectively inexplicable anomalies.<sup>26</sup>

The ongoing transition to self-government by courts (for the Swiss Federal Supreme Court [Schweizerisches Bundesgericht] Article 188 Paragraph 3 Federal Constitution)<sup>27</sup> brings with it the requirement of in-court supervision (supervision of management and administrative bodies) – for higher and lower judicial authorities, depending on the structure. This supervisory activity concerns itself mainly with court management. The supervisory authority must query excessively long lists of pending cases and inefficiencies (also in relation to individual judges).<sup>28</sup> Self-government makes high demands with regard to (management) quality. Caseload management is an important element of self-government<sup>29</sup>; case allocation takes the workload and the performance of individual judges into account.<sup>30</sup> Self-government also includes personnel management and career development; performance assessments are an essential basis for employee appraisal interviews and status reviews, not to mention employers' references. Unlike most EU states<sup>31</sup>, Switzerland has no particular law of the judiciary in the sense of comprehensive public service legislation.<sup>32</sup> Judges of first instance especially are usually subject to general public service law, sometimes with modifications specific to the judiciary.<sup>33</sup> This means that, where applicable, even a judge can demand an employer's reference, which not only confirms the judge's employment as such, but includes details concerning performance and conduct. This is important, in part because Switzerland has no regulated or customary career paths for judges, and changes of occupation from the judiciary to public administration and the private sector are common.<sup>34</sup> Guaranteeing that an employers' reference will be provided requires a continual assessment of performance and conduct. This is particularly essential in the case of judges, who often have no designated superiors or whose governing committee members change annually or at regular intervals.

In Switzerland, judges are appointed for a fixed term of office (at federal level in accordance with Article 188 Paragraph 4 Federal Constitution) either by parliament or by plebiscite (at federal level in accordance with Article 168 Paragraph 1

<sup>26</sup> See already A. Lienhard, *Staats- und verwaltungsrechtliche Grundlagen für das New Public Management in der Schweiz*, 2005, p. 467.

<sup>27</sup> A. Lienhard, 'Die bernische Gerichtsbarkeit auf dem Weg zur Selbstverwaltung', in R. Herzog & R. Feller (eds.), *Bernische Verwaltungsgerichtsbarkeit in Geschichte und Gegenwart*, p. 401 ff., in particular p. 411 ff.; see also for example H. Wipfli, 'Justizielle Selbstverwaltung', in B. Schindler & P. Sutter (eds.), *Akteure der Gerichtsbarkeit*, 2007, p. 115 ff.; Klopfer, note 2, para. 4 ff.; A. Lienhard & D. Kettiger, 'Die Selbstverwaltung der Gerichte, Erkenntnisse der Auslegung von § 112 Abs. 2 der Verfassung des Kantons Basel-Stadt', 2013 *Richterzeitung*, no. 3 (<<http://richterzeitung.weblaw.ch/rzissues/2013/3/2258.html>> (last visited 20 October 2014)); M. Niquille, 'Das Bundesgericht verwaltet sich selbst (Art. 188 Abs. 3 BV)', 2013 *AJP*, p. 1358 ff.; B. Frey, 'Die selbständige Gerichtsverwaltung im Kanton Solothurn oder: Wie der Justizdirektor sich fast selber abschaffte', in A. Eng et al. (eds.) *Festgabe Walter Straumann*, 2013, p. 154 ff.

<sup>28</sup> G. Müller, 'Politik und Medien', in P. Hänni (ed.), *Mensch und Staat – L'homme et l'Etat, Festschrift für Thomas Fleiner*, 2003, p. 545 ff.

<sup>29</sup> A. Lienhard & D. Kettiger, 'Geschäftslastbewirtschaftung bei Gerichten: Methodik, Erfahrungen und Ergebnisse einer Studie bei den kantonalen Verwaltungs- und Sozialversicherungsgerichten', 2009 *ZBI*, no. 110, p. 413 ff.; the same, 'Caseload Management in the Law Courts: Methodology, Experiences and Results of the first Swiss Study of Administrative and Social Insurance Courts', 2010 *IJCA* Vol. 3, no. 1, p. 30 ff. (<<http://www.ijca.ws/ijca-vol.-3-no.-1.html>> (last visited 20 October 2014)).

<sup>30</sup> A. Aeschlimann, 'Justizreform 2000 – Das Bundesgericht und sein Gesetz', 2008 *ZBI*, no. 109, p. 397 ff., p. 404 und 413; C. Bandli, 'Das Bundesverwaltungsgericht als Eckpfeiler der Justizreform: Bewährtes und Anpassungsbedarf', 2012 *ZBJV*, no. 148, p. 101 ff., p. 111 f.

<sup>31</sup> See S. Gass, 'Die Stellung des Richters im neuen Personalgesetz', in G. Biaggini et al. (eds.), *Aspekte der richterlichen Unabhängigkeit und Richter(-aus-)wahl*, presentations at the conference of the Administrative and Insurance Court of the Canton of Basel-Landschaft on 21 October 1998, 2000, p. 84 ff.

<sup>32</sup> See however for example the German Judges Act of 8 September 1961 (*DRiG*; <<http://www.gesetze-im-internet.de/bundesrecht/drig/gesamt.pdf>> (last visited 20 October 2014)) and the judges acts of the individual Bundesländer.

<sup>33</sup> For the federal courts, there are largely self-contained regulations (the Federal Supreme Court Act of 17 June 2005 [FSCA; SR 173.110] and the Federal Assembly Act and the Ordinance of 6 October 1989 on the Remuneration and Occupational Pensions of Senior Government Officials and Supreme Court Judges [SR 172.121 and SR 172.121.1 respectively] for Federal Supreme Court judges and the Patent Court Act of 20 March 2009 [PatGG; SR 173.141], the Administrative Court Act of 17 June 2005 [FACA; SR 173.32], the Criminal Justice Authorities Act of 19 March 2010 [StBOG; SR 173.71] and the Federal Assembly Ordinance of 13 December 2002 on the on the Employment and Remuneration of Judges of the Federal Administrative Court, the ordinary judges of the Federal Criminal Court and the Full-time Judges of the Federal Patent Court [Judges Ordinance; SR 173.711.2] for the other federal judges). Gass argues for individual acts on judicial services, note 31.

<sup>34</sup> If available, candidates for new judicial positions, for example in the canton of Aargau, must also submit employers' references or the minutes of any performance review interviews (A. Schmid, 'Vorbereitung der Wahlen von Richterinnen und Richtern durch das Parlament des Kantons Aargau', 2013 *Parlament – Mitteilungsblatt der Schweizerischen Gesellschaft für Parlamentsfragen*, no. 2, p. 37 ff., in particular p. 39).



Federal Constitution, they are elected by the United Federal Assembly). The criteria for eligibility vary from canton to canton. The process of judicial selection is generally prepared by a parliamentary judicial committee. However, affiliation to a political party usually plays a crucial role. Switzerland does not have a career judiciary and has no procedure for promotion to higher courts.<sup>35</sup> The system of reappointment is mainly justified by "...the necessity, for the very sake of his independence, to occasionally place the judge under the spotlight of measurable control, measurable by whether the superior authority continues to recognize and respect his judicial qualities."<sup>36</sup> This inevitably raises the question of (re)appointment criteria, aside from affiliation to any political party.<sup>37</sup> It is self-evident that individual performance should be among these criteria.<sup>38</sup> Accordingly, it must be possible to assess a number of professional and personal characteristics (in particular professional expertise, personal and social skills and management abilities).<sup>39</sup> Insofar as appointments are considered decisions and thus fundamental procedural guarantees must be observed in (re-)appointments (Article 29 Federal Constitution), such acts of applying the law must also be adequately justified.<sup>40</sup> In this case, the pre-defined<sup>41</sup> suitability or appointment criteria must be referred to.<sup>42</sup>

As non-re-appointment for personal rather than organizational reasons is equivalent to dismissal from office to the individual concerned, it is essential that proper justification is given.<sup>43</sup> In any case, non-re-appointment must not be abused in order to avoid proceedings to dismiss a judge from office.<sup>44</sup> The necessity of adequate justification, and where applicable justification that considers individual performance, is further accentuated in the context of disciplinary proceedings.

Where objectively inadequate justification is given for non-re-appointment, dismissal or disciplinary decisions, this is also problematic from the point of view of judicial independence (Article 30 Paragraph 1, 191c Federal Constitution).<sup>45</sup>

<sup>35</sup> For selection, appointment and reappointment of judges see R. Kiener, 'Judicial Independence in Switzerland', in A. Seibert-Fohr (ed.), *Judicial Independence in Transition*, 2012, p. 403 ff., p. 411 ff. For an overview on the various systems of (re-)appointment in Switzerland, see P. Mahon & R. Schaller, 'L'élection des juges entre tradition démocratique et exigences de l'Etat de droit', 2013 *Parlament – Mitteilungsblatt der Schweizerischen Gesellschaft für Parlamentsfragen*, no. 2, p. 3 ff. For criticism of the principle of having a term of office, see in particular Walter, note 7, para. 29; Kiener, note 18, p. 263 f.; Stadelmann, note 13, para. 7, with further references. An exception to the principle of having a term of office is only found in the canton of Freiburg (see Kiener, *ibid.*, p. 419).

<sup>36</sup> K. Eichenberger, 'Sonderheiten und Schwierigkeiten der richterlichen Unabhängigkeit in der Schweiz', in R. Frank (ed.), *Unabhängigkeit und Bindungen des Richters*, Supplement Nr. 22 zur ZSR, 1997, p. 69 ff., 81; for further justification (in particular the specific weighting of the principle of democracy, restraint of powers and regulatory law aspects) R. Kiener, 'Sind Richter trotz Wiederwahl unabhängig?', 2001 *plädoyer*, no. 5, p. 37 f.

<sup>37</sup> See for example H. Seiler, 'Richter als Parteivertreter, Parteienproporz und Richterwahl', 2006 *Richterzeitung*, no. 3, para. 1 ff. (<<http://richterzeitung.weblaw.ch/rzissues/2006/3/r193.html>> (last visited 20 October 2014)); P. Albrecht, 'Richter als (politische) Parteivertreter?', 2006 *Richterzeitung*, no. 3, para. 1 ff. (<<http://richterzeitung.weblaw.ch/rzissues/2006/3/r191.html>> (last visited 20 October 2014)); Raselli, note 20, para. 6 ff., with further references. On the criticism of the dominant position of political parties in the appointment procedure, see Stadelmann, note 13, para. 2, with further references.

<sup>38</sup> See also T. Hugi Yar & A. Kley, in M. A. Niggli et al. (eds.), *Basler Kommentar zu Art. 9 BGG*, para. 3e; see also D. Rietiker, 'Qualitätskontrollen für Strassburger Richter', 2012 *Richterzeitung*, no. 2 (<<http://richterzeitung.weblaw.ch/rzissues/2012/2/r1102.html>> (last visited 20 October 2014)); electing judges on the basis of the performance of the candidates (a 'merit-selection system') is also derived from Art. 14 Sec. 1 UN Covenant II (reference from R. Kiener, 'Verfahren der Erneuerungswahlen von Richterinnen und Richtern des Bundes', 2008 *VPB*, no. 3, p. 363). For appointments to the federal courts, although reference is made to professional and personal suitability in the invitation for applications, these criteria are not laid down in the legislation; in the case of re-appointments, the judicial committee preparing for the appointments does not obtain an overview of performance to date (see K. Marti, 'Die Gerichtskommission der Vereinigten Bundesversammlung', 2010 *Richterzeitung*, no. 1, in particular para. 7 [<<http://richterzeitung.weblaw.ch/rzissues/2010/1/r719.html>> (last visited 20 October 2014)]). The principles of conduct of the judicial committee on the Committee procedure for removal from office or non-re-appointment of 3 March 2011 (BBI 2012 1271 ff.) indeed cover the procedure, but say nothing further on professional or personal eligibility criteria.

<sup>39</sup> See for example P. Albrecht, 'Was zeichnet gute Richterinnen und Richter aus?', in B. Schindler & P. Sutter (eds.), *Akteure der Gerichtsbarkeit*, 2007, p. 3; F. Bieler & J. Lorse, *Die dienstliche Beurteilung*, 2012, p. 373; J. Riedel, 'Training and Recruitment of Judges in Germany', 2013 *IJCA* Vol. 5, No. 2, p. 48 f. (<<http://www.iacajournal.org/index.php/ijca/article/view/12>> (last visited 20 October 2014)); *ibid.*, Individual Evaluation of Judges in Germany (forthcoming), p. 3 ff.; J.M. Singer, 'Knowing is half the battle: A proposal for prospective Performance Evaluations in Judicial Evaluations', 2006-2007 *UALR Law Review* Vol. 29, p. 725 ff.; for a critical appraisal see Doogue et al., note 21, p. 14.

<sup>40</sup> At any rate in relation to re-appointment of federal judges, see Kiener, note 38, p. 357 ff., 360, 379.

<sup>41</sup> In this sense, see also Mahon & Schaller, note 35, p. 13 f.

<sup>42</sup> For example in the canton of Aargau: Schmid, note 34, p. 39 f.

<sup>43</sup> Kiener, note 38, p. 369; similarly Stadelmann, note 13, para. 8.

<sup>44</sup> Kiener, note 38, p. 369.

<sup>45</sup> See for example M. Kayser, 'Richterwahlen: Unabhängigkeit im Spannungsfeld von Rechtsstaatlichkeit und Demokratie', in B. Schindler & P. Sutter (eds.), *Akteure der Gerichtsbarkeit*, 2007, p. 60 f. The grounds for not re-electing judges must be substantial, such as permanent disruption of the judicial process, damage to the trust in/credibility of the justice system, incompetence/inappropriate conduct, serious/repeated breaches of official duties (Kiener, note 36, p. 42).

## 2.2. Barriers

Judicial independence is the key constitutional barrier that prevents external influencing of judicial decisions (Article 30 Paragraph 1, 191c Federal Constitution).<sup>46</sup> In this context, binding performance targets for judges seem constitutionally problematic, certainly if they are not set by the Constitution itself (for example by the prohibition of judicial delays) or by law (for example case processing deadlines prescribed by law).<sup>47</sup> However, performance targets such as planning measures within the judicial sector in relation to the number of cases are increasingly viewed as acceptable and necessary.<sup>48</sup> 'Court administration necessitates management. Management does not necessarily violate personal judicial independence as long as it contributes to the self-government of the court. ... Binding goals of an organizational nature or that concern the management of the justice system are not merely acceptable, but absolutely necessary.'<sup>49</sup>

The ongoing problem of how to assess judicial performances in qualitative terms is often mentioned in connection with judicial independence.<sup>50</sup> The problem with judicial activity is that its influence on society cannot easily be measured.<sup>51</sup> Performance indicators are often quantitative measurements that give little indication of the quality of a judgment.<sup>52</sup> Efficiency analyses therefore must always consider qualitative aspects as well, otherwise judicial independence could be affected.<sup>53</sup>

However, judicial independence does not preclude effective quality control in principle. Indeed it could even ensure it: 'Adequacy or inadequacy in office is not a question of independence, and suitable preventive or repressive measures in order to guarantee quality foster and do not counteract, the right form of independence. In particular, the nimbus of independence does not trivialize the seriousness of professional or social shortcomings, and a judge's autonomy must not allow him to treat his office as a comfortable sinecure. Despite the shield of independence, effective quality control is a matter of means, not of principle.'<sup>54</sup>

The imperative of efficiency as part of the guarantee of justice<sup>55</sup> must not undermine that guarantee. It has been established, for example, that judicial performance increases with an increasing workload – though only to a certain degree.<sup>56</sup> Excessive pressure on courts and judges to be efficient must therefore be avoided.<sup>57</sup>

As long as performance assessments concern individual judges, the constitutional protection of privacy (in particular Article 13 Paragraph 2 Federal Constitution) could be affected.<sup>58</sup> every person has the right to be protected against the

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<sup>46</sup> See for detail R. Kiener, *Richterliche Unabhängigkeit*, 2001, in particular p. 235 f.; in this connection H.-J. Mosimann, 'Richterliche Unabhängigkeit und Leistungsbeurteilung: Schweiz', in Stadelmann et al. (eds.), note 1, p. 87 ff., p. 92 ff., with further references (see also *ibid.*, 'Leistungsbeurteilung von Richterinnen und Richtern – Qualitätsmerkmal oder Angriff auf die richterliche Unabhängigkeit?', 2011 *Richterzeitung*, no. 1 [<http://richterzeitung.weblaw.ch/rzissues/2011/1/r871.html>] (last visited 20 October 2014)). See on the international agreements, declarations and standards on judicial independence, S. Gass et al. (eds.), *Standards on judicial independence*, 2012.

<sup>47</sup> A. Lienhard, *Staats- und verwaltungsrechtliche Grundlagen für das New Public Management in der Schweiz – Analyse, Anforderungen, Impulse*, 2005, p. 465 ff.; P. Tschümperlin, 'Gerichtsmanagement am Bundesgericht: Stand und Entwicklungstendenzen', in D. Kettiger (ed.), *Wirkungsorientierte Verwaltungsführung und Justiz – ein Balanceakt zwischen Effizienz und Rechtsstaatlichkeit*, 2003, p. 93; Kettiger, note 10, p. 189.

<sup>48</sup> U. Cavelti, 'Der Gerichtspräsident – primus inter pares oder Justizmanager', in P. Mäusli-Allenspach & M. Beusch (eds.), *Steuern und Recht – Steuerrecht (Schweiz), Liber amicorum für Martin Zweifel*, 2013, p. 330; in the same context, see also P. Tschümperlin, 'Die Aufsicht des Bundesgerichts', 2009 *SJZ*, p. 237.

<sup>49</sup> Cavelti, note 48, p. 332.

<sup>50</sup> Walter, note 7, para. 28.

<sup>51</sup> Lienhard, note 27, p. 424.

<sup>52</sup> Raselli, note 20, para. 20, also Mosimann (2011), note 46, para. 50, who comments critically in particular on numbers of appeals and reversed decisions.

<sup>53</sup> Cf. U. Berlit, 'Richterliche Unabhängigkeit und Organisation effektiven Rechtsschutzes im 'ökonomisierten' Staat', in H. Schulze-Fielitz & C. Schütz (eds.), *Justiz und Justizverwaltung zwischen Ökonomisierungsdruck und Unabhängigkeit*, Die Verwaltung, Supplement 5, 2002, p. 135 ff., in particular p. 156.

<sup>54</sup> Walter, note 7, para. 34; see also No 2.1 above.

<sup>55</sup> On the requirement of efficiency, see Sec. 2.1 above.

<sup>56</sup> K. Jonski & D. Mankowski, Is sky the limit? – Revisiting 'exogenous productivity of judges' argument, 2014 *IJCA* Vol. 6 No. 2 ([www.iacajournal.org](http://www.iacajournal.org)).

<sup>57</sup> See for example F. von Ruben, 'Der Druck der Überforderung, Wenn Richter überfordert sind mit dem Anspruch, nur der Wahrheit und Gerechtigkeit zu dienen' ..., *Betrifft* 2013 *Justiz*, no. 113, p. 24 ff.

<sup>58</sup> The protection of privacy may have compensatory significance for judges, because they cannot themselves call on judicial independence in its form as a fundamental right (Kiener, note 46, p. 381).

misuse of their personal data. Therefore, judgment-related performance data for individual judges is not made available to the general public.<sup>59</sup>

### 2.3. Preliminary Conclusion

Constitutional law offers certain principles that underline the appropriateness of performance assessments of judicial activity: judicial performance is an element of effectiveness and efficiency, the subject matter of self-government, supervision and oversight, and a criterion in appointments, re-appointments and dismissals or disciplinary proceedings. The assessment of the performance of judges is therefore essential to guaranteeing justice.

However, constitutional law also lists a number of substantial barriers to performance assessment in order to protect the judiciary. Judicial independence above all other factors is meant to allow courts and judges to perform their duties without performance targets that directly influence judicial activity. Certain special requirements regarding the conduct of performance assessment of judges also arise from the law on the protection of privacy.

Performance assessments cannot be equated with performance targets – however, they can indirectly exert a certain pressure on the level of performance. Even this effect is problematic when considering the importance of judicial independence.<sup>60</sup> It can only be justified when set against the background of other principles relating to the organization of the judiciary – but only as long as the procedurally prescribed care in case processing is not adversely affected.<sup>61</sup>

Therefore, from a general constitutional standpoint, it is not a question of whether performance assessments in the judiciary are permitted. Rather, it is a question of how these assessments should be organized in a fair and balanced manner in accordance with the various principles of constitutional law. The conflict between guaranteeing justice and protecting the judiciary raises the following key questions<sup>62</sup>:

- What purpose do performance assessments serve (case allocation, quality assurance, career development, re-appointment, agreeing salaries) and what are the consequences?
- What is the subject of a performance assessment (judicial activity, management) and what are the assessment criteria?
- How is performance recorded in order to form the basis for a performance assessment (statistics, surveys, meetings)?
- Who is the subject of a performance assessment (courts, divisions, judges, clerks of court) and should there be a differentiation between members of higher and lower courts?
- Who conducts a performance assessment (judges themselves, presidents of divisions, court management boards, higher courts, supervisory authorities) and what are the rights of recourse?
- To whom are the results of the performance assessment addressed (judges, presidents of divisions, court management boards, supreme courts, the oversight authorities, the general public)?

The following observations focus on the performance assessment of judges. The challenges raised by judicial independence do not affect the performance assessment of courts<sup>63</sup> or court registrars<sup>64</sup> as significantly.<sup>65</sup>

<sup>59</sup> See BGE 137 I 1 ff. relating to the disclosure of daily allowances for commercial court judges for a specific case (see A. Lienhard & D. Kettiger, 'Keine Absage an ein zeitgemässes Justizmanagement', 2011 *Richterzeitung*, no. 2 [<http://richterzeitung.weblaw.ch/rzissues/2011/2/r923.html>] (last visited 20 October 2014)); see also Doogue et al., note 21, p. 13.

<sup>60</sup> Roland Rechtsreport, *Sonderbericht: das deutsche Rechts- und Justizsystem aus Sicht von Richtern und Staatsanwälten*, 2014, p. 54 (34 or 45% of judges interviewed [with or without management duties] admit that the assessment system influences their personal or professional independence).

<sup>61</sup> Lienhard & Kettiger, note 27, para. 18, *ibid.*, note 59, para. 18 ff.

<sup>62</sup> See also Gass & Stolz, note 7; S. Gass & T. Stadelmann, 'Leistungsbeurteilung in der Justiz und richterliche Unabhängigkeit im Spannungsfeld von Recht und Politik, Wirtschaft und Gesellschaft', in Stadelmann et al. (eds.), note 1, p. 7 ff.; Stadelmann, note 20, para. 1; Mosimann (2015), note 46, p. 102; M. Keel, *Die Leitungsstrukturen der Justiz im Bund und in ausgewählten Kantonen – Eine Studie im Spannungsfeld von Führung und verfassungsrechtlichen Prinzipien*, Diss. St. Gallen 2014, p. 312 ff.

<sup>63</sup> As a whole or of specific collegial panels of judges (divisions, chambers).

<sup>64</sup> See in this context, Mosimann (2015), note 46, p. 91, 102; in general P. Uebersax, 'Die Stellung der Gerichtsschreiberinnen und Gerichtsschreiber in der Gerichtsverfassung', in B. Schindler & P. Sutter (eds.), *Akteure der Gerichtsbarkeit*, 2007, p. 77 ff.

<sup>65</sup> See on this issue, for example Uebersax, note 64, p. 77 ff.; M. Beusch, 'Die Zusammenarbeit zwischen Richterinnen und Gerichtsschreibern', 2007 *Richterzeitung*, no. 2 (<http://richterzeitung.weblaw.ch/rzissues/2007/2/r311.html>) (last visited 20 October 2014)).

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### 3. Current Examples in Switzerland

#### 3.1. Preliminary Remarks

The following section should give an overview of existing approaches to the performance assessment of judges in Switzerland with the help of selected, succinct examples. The simple supervision of court business, as is standard in courts,<sup>66</sup> is not the subject of this overview. Likewise it will not review the performance targets for or within courts or divisions.<sup>67</sup>

#### 3.2. Number of Cases Dealt with by Specific Judges

For implementation of the Federal Assembly's Ordinance on Judicial Positions (Verordnung der Bundesversammlung über die Richterstellen am Bundesgericht) at the Federal Supreme Court of 30 September 2011,<sup>68</sup> the Federal Supreme Court runs a controlling procedure devised in consultation with the parliamentary supervisory committees.<sup>69</sup> As a result of the observations made, this procedure has recently been revised and presented to the supervisory committees. With regard to the accessibility of the statistical data obtained, the controlling concept differentiates between public data in its annual report, special controlling data for the parliamentary committees and internal controlling.<sup>70</sup> The controlling records inter alia the performances of the individual divisions (for example the number of judgments issued). The number of cases completed by individual judges is recorded as part of the internal controls.<sup>71</sup> The supervisory committees receive details of the average number of cases per judge for each division. Deficiencies in individual judges are brought to the attention of the parliamentary Judiciary Committee (Gerichtskommission) if these are significant and could potentially jeopardise re-appointment.<sup>72</sup>

The Federal Administrative Court (Bundesverwaltungsgericht) allocates cases to individual judges in an electronically automated procedure (known as the Bandlimat). It therefore possesses performance data pertaining to individual judges that are drawn from the electronic administrative process and can be combined with each other.<sup>73</sup>

The Cantonal Supreme Court in Graubünden (Kantonsgericht Graubünden) and the Cantonal Supreme Court in Neuchâtel (Tribunal cantonal Neuchâtel) both use a similar automated case allocation system.<sup>74</sup> The Social Insurance Court of the Canton of Zurich (Sozialversicherungsgericht des Kantons Zürich) takes the current workload of the judges in each division into consideration when allocating cases to judges.<sup>75</sup> Caseload management systems that record the judges' workload can likewise be found in other higher cantonal courts.<sup>76</sup> Many cantonal courts regard the work output of the individual judges as an element in quality management.<sup>77</sup>

#### 3.3. Employee Appraisal and Status Interviews

At civil and criminal courts of first instance in the canton of Bern, annual status interviews with the judges are carried out.<sup>78</sup> These talks are considered to be a factor in the quality of institutional independence and serve to maintain and encourage the judges' professional and social skills. The subject of the discussions is the judges' activities in office, including the

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<sup>66</sup> Lienhard et al., note 2, p. 14 f.

<sup>67</sup> See for an overview of this Lienhard et al., note 2, p. 18 f., with further references.

<sup>68</sup> SR 173.110.1.

<sup>69</sup> Federal Supreme Court Controlling Concept for the attention of the Control Committee, 5 March 2007; for detail, see Lienhard, note 20, para. 10 ff.

<sup>70</sup> On this cascade-type structure see Lienhard, note 20, para. 8 ff.; *ibid.*, note 4, para. 65 ff.

<sup>71</sup> Lienhard, note 20, para. 13.

<sup>72</sup> Lienhard, note 20, para. 12; according to a draft of the ordinance it was intended to provide the Commission with statistics on the number of cases dealt with by the individual judges.

<sup>73</sup> Bandli, note 30, p. 111 f.; for more detail on how panels of judges are formed in courts, see *ibid.*, 'Zur Spruchkörperbildung an Gerichten: Vorausbestimmung als Fairnessgarantin', in R. Reusser & B. Schindler (eds.), *Aus der Werkstatt des Rechts, Festschrift für Heinrich Koller*, 2006, p. 209 ff.

<sup>74</sup> Lienhard et al., note 2, p. 16, with further references.

<sup>75</sup> H.-J. Mosimann, 'Geschäftslastbewirtschaftung am Sozialversicherungsgericht des Kantons Zürich', 2009 *Richterzeitung*, no. 3, para. 6 (<<http://richterzeitung.weblaw.ch/rzissues/2009/3/r658.html>> (last visited 20 October 2014)).

<sup>76</sup> Supreme Court of the Canton of Basel-Landschaft, Administrative Court of the Canton of Bern, Supreme Court and Administrative Court of the Canton of Graubünden, Supreme Court of the Canton of Lucerne, Administrative Court of the Canton of St. Gallen, Administrative Court of the Canton of the Ticino, Supreme Court and Administrative Court of the Canton of Thurgau, Supreme Court of the Canton of Vaud, Supreme Court of the Canton of Valais, Supreme Court and Administrative Court of the Canton of Zug, Administrative Court of the Canton of Zurich (Lienhard et al., note 2, p. 15 f.).

<sup>77</sup> The performance of the judges and the court staff is used at the following courts as one of several indicators for measuring quality: Supreme Court of the Canton of Aargau, Supreme Court of the Canton of Bern, Supreme Court of the Canton of Lucerne, Administrative Court of the Canton of St. Gallen, Supreme Court of the Canton of Schaffhausen, Administrative Court of the Canton of the Ticino, Administrative Court of the Canton of Zug (Lienhard et al., note 2, p. 17 f., with further references).

<sup>78</sup> Lienhard et al., note 2, p. 26.



duration and number of concluded cases, but not the content of judicial decisions. Senior judges of the courts of first instance conduct the interviews (although a representative of the supervisory authority can be called on in exceptional cases). The President of the Cantonal Supreme Court receives the results in anonymized form and is responsible for providing the annual management feedback to the senior judges. The individual reports may not be used in connection with judicial appointments and are only available as reference information with consent. The status interviews have no effect on salary.<sup>79</sup>

Staff appraisal interviews at courts of first instance are also held in the canton of Zurich.<sup>80</sup> Under the rules on personnel management, each year superiors assess judges on their performance and conduct (such as expeditiousness in dealing with cases, personal development corresponding to the judges' portfolio<sup>81</sup>). Judicial decisions as such are not the subject of this assessment, but the assessment is relevant to increases in salary.<sup>82</sup>

Staff appraisal interviews with judges at courts of first instance are also conducted in the canton of Lucerne; the court presidents hold the meetings with the judges annually.<sup>83</sup>

The higher courts in the canton of St. Gallen<sup>84</sup> and the Social Insurance Court in the canton of Zurich also carry out regular staff appraisal interviews with judges.<sup>85</sup>

### 3.4. Quality Circles and Peer Reviews

Judges discuss questions of judicial activity and management at regular sessions (plenary, divisional or chamber) at numerous cantonal supreme courts and federal courts.

In addition, colleagues discuss individual cases at most cantonal supreme courts, the Federal Supreme Court and at the Federal Criminal Court (Bundesstrafgericht).<sup>86</sup>

For the last three years, voluntary 'collegial feedback' has been an option at the Federal Criminal Court. This assessment focuses on efficiency and professional, management and social skills. Around half of the judges make use of it.<sup>87</sup>

### 3.5. Surveys

A survey on the performance of judicial authorities was recently carried out in the Canton of Bern.<sup>88</sup> Court management was the subject of the survey, which identified points such as the accessibility of the authorities or interaction with parties to the proceedings and the legal profession. Participation in the survey was anonymous and the evaluation made no comments on particular individuals.

Surveys on satisfaction with the quality of service in courts were also carried out in five other cantons.<sup>89</sup>

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<sup>79</sup> Supreme Court of the Canton of Bern, Status discussions with judges, 25 November 2013; M. Grütter, 'Leitungskompetenz in der Justiz', 2012 *Richterzeitung*, no. 3, in particular para. 10 f. (<http://richterzeitung.weblaw.ch/rzissues/2012/3/2015.html>) (last visited 20 October 2014)); R. Müller Brunner, 'Richter darf niemand beurteilen', 2014 *plädoyer*, no. 1, p. 73.

<sup>80</sup> Lienhard et al., note 2, p. 26.

<sup>81</sup> See R. Klopfer & D. Preckel, 'Das 'Richterportfolio' – ein neuer Weg in der schweizerischen Richterausbildung?', in B. Schindler & P. Sutter (eds.), *Akteure der Gerichtsbarkeit*, 2007, p. 23 ff.

<sup>82</sup> On implementation, see Mosimann (2011), note 46, para. 22 f.; Müller Brunner, note 79, p. 72. The relevance of the performance assessment for an increase in salary must be distinguished from the initial allocation to a salary class, which is not considered in this paper (on the latter, see D. Kettiger, 'Zur Gehaltseinreihung von Richterinnen und Richtern: Anmerkungen zu BGE 138 I 321', 2013 *Richterzeitung*, no. 1 [<http://richterzeitung.weblaw.ch/rzissues/2013/1/2137.html>] (last visited 20 October 2014))).

<sup>83</sup> Lienhard et al., note 2, p. 26.

<sup>84</sup> Lienhard et al., note 2, p. 26 (the interviews are conducted by the president of the Administrative Court).

<sup>85</sup> H.-J. Mosimann, 'Erfahrungen mit NPM am Sozialversicherungsgericht des Kantons Zürich', in Kettiger, note 10, p. 70.

<sup>86</sup> Lienhard et al., note 2, p. 27, with further references.

<sup>87</sup> Müller Brunner, note 82, p. 72.; see also Stadelmann et al. (eds.) note 1, p. 293 ff.

<sup>88</sup> BEJUBE, 'Beurteilung der Justiztätigkeit im Kanton Bern oder Was halten die Kunden von unserer Arbeit?', Zusammenfassung der Ergebnisse', April 2001, an extract is available in Bernischer Anwaltsverband (ed.), 2001 *in dubio*, no. 2, p. 99 ff. (<[www.bav-aab.ch/de/publikationen/in-dubio-archiv/2001](http://www.bav-aab.ch/de/publikationen/in-dubio-archiv/2001)> (last visited 21 October 2014)); F. Paychère, 'Les enquêtes de satisfaction conduites auprès des tribunaux des cantons de Berne et de Genève', 2013 *Les cahiers de la justice*, no. 1, p. 37 ff.

<sup>89</sup> Lienhard et al., note 2, p. 29, with further references: Supreme Court of the Canton of Appenzell-Innerrhoden (see I. Kobler-Bryner, 'Kundenzufriedenheit mit den Gerichtsverfahren im Kanton Appenzell-Innerrhoden', 2013 *Richterzeitung*, no. 4

[<<http://richterzeitung.weblaw.ch/rzissues/2013/4/2413.html>> (last visited 21 October 2014))), Supreme Court of the Canton of Geneva, Supreme Court of the Canton of Solothurn (see P. Haussener, 'Zweite Umfrage der Gerichtsverwaltungskommission des Kantons Solothurn unter der Anwaltschaft zur Zufriedenheit mit den Gerichten', 2013 *Richterzeitung*, no. 4

[<<http://richterzeitung.weblaw.ch/rzissues/2013/4/2354.html>> (last visited 21 October 2014))), Supreme Court of the Canton of Valais and Supreme Court of the Canton of Zurich.

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### 3.6. Empirical Findings

The overview reveals that there are various approaches to assessing the performance of judges at federal and cantonal courts. These approaches range from the simple quantitative recording of processed judgments to staff appraisal interviews, and they can concern management and/or judicial activity. The performance assessment is the responsibility of the judges themselves (peer review and quality circles), the court or divisional management (case allocation, status discussions and staff appraisal interviews) or, in the case of re-appointment, of the advisory parliamentary committee. Surveys, when carried out, do not pertain to specific individuals. Performance assessments – with one apparent exception – have no effect on salary.

However, not enough experience has been gained in order to provide meaningful information on the structure and effects of the performance assessment of judges.

## 4. Developments Abroad

### 4.1. Preliminary Remarks

Information on selected international institutions and their approaches to assessing the performances of judges are listed below first. Thereafter, examples from various different countries (mainly in Western Europe) are used to illustrate how the performance assessments of judges are organized.

In addition, reference is made to the recently published country reports, and the corresponding summary, on most of the countries represented by the European Association of Judges/EAJ.<sup>90</sup>

### 4.2. International Institutions

The European Commission for the Efficiency of Judges (CEPEJ) has for a long time concerned itself with the assessment of judges' performance as an element in the quality of the justice system. In particular the duration of proceedings and the number of concluded cases are specified as criteria.<sup>91</sup> The CEPEJ is currently compiling further principles for the quality assessment of courts. They underline the necessity of differentiating between the quality of judgments and quality of service in courts. In addition to the quality of courts, the question of the quality of judges' performance continues to be addressed.<sup>92</sup>

The Consultative Council of European Judges (CCJE) has published a report on the quality of judicial decisions. It particularly emphasizes the fact that the quality of judicial decisions depends not only on controllable factors (such as procedural management, duration of proceedings, intelligibility, communication), but also on the external environment (for example the quality of legislation, available resources, the quality of legal training). Quality assessment requires a number of indicators and methods. Personal data must remain confidential. Self-assessments should be given priority.<sup>93</sup> The structures for the evaluation of judges in the member states are highly heterogeneous, according to a recent survey.<sup>94</sup> Recently, the CCJE has adopted its Opinion No. 17 on "the Evaluation of judges' work, the quality of justice and respect for judicial independence".<sup>95</sup>

Various other organizations in Europe study the issue of judicial performance assessment: a report by the European Network of Councils for the Judiciary (ENCJ) has given an overview of various existing evaluation systems.<sup>96</sup> The Committee of Ministers of the Council of Europe has likewise commented on judges and performance assessments in a

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<sup>90</sup> Stadelmann et al., note 1, p. 135 ff.

<sup>91</sup> CEPEJ, *Check-list pour la promotion de la qualité de la justice et des tribunaux*, 2008; F. Paychère, 'La Promotion de la qualité, un enjeu pour les tribunaux helvétiques?', 2009 *Richterzeitung*, no. 3 (<<http://richterzeitung.weblaw.ch/rzissues/2009/3/r653.html>> (last visited 21 October 2014)).

<sup>92</sup> CEPEJ, *Measuring the Quality of Judicial Services*, Draft, 2 April 2013.

<sup>93</sup> In general: CCJE, *Opinion No 11 for the attention of the Committee of Ministers of the Council of Europe on the quality of judicial decisions*, 2008. The issue of performance assessment is also the subject of other CCJE opinions: for example, *Opinion No 1 on standards concerning the independence of the judiciary and the irremovability of judges*, 2001, *Opinion No 6 on fair trial within a reasonable time and judges' role in trials taking into account alternative means of dispute settlement*, 2004, *Opinion No 10 on the role of the Council for the Judiciary in the service of society*, 2007, *Opinion No 14 on justice and information technologies (IT)*, 2011 and *Opinion No 15 on the specialisation of judges*, 2012.

<sup>94</sup> Riedel (forthcoming), note 39, p. 8 and Annex II, with further references.

<sup>95</sup> <<https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=2634760&SecMode=1&DocId=2203444&Usage=2>> (last visited 10 November 2014).

<sup>96</sup> European Network of Councils for the Judiciary, *Working group on evaluation of Judges*, 2005; *ibid.*, *Report on performance management of Judges*, 2006/2007.

recommendation.<sup>97</sup> The Association of Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe) has held an event dedicated to judicial evaluation.<sup>98</sup> The International Association of Judges (IAJ) has published a report, comprising 32 countries, which also dealt with the issue of performance assessment.<sup>99</sup>

#### 4.3. USA

The National Center for State Courts (NCSC) runs a program of judicial performance evaluation (JPE) that seeks to reconcile the conflict between independence and the guarantee of justice. The goal and purpose of the program is to develop the skills of individual judges.<sup>100</sup> This is implemented differently at the individual courts<sup>101</sup> – some even publish the performance details of individual judges in reports or on websites.<sup>102</sup>

#### 4.4. Germany<sup>103</sup>

The assessment of judges is part of administrative supervision. In principle, these assessments are conducted every four to five years until the judge reaches the age of 50. Selection for judicial office or promotion is also primarily made according to suitability, competence and professional performance. The requirement of performance assessment is derived from the duty to guarantee justice.<sup>104</sup>

The assessments cover legal knowledge, negotiation skills (not, however, the conduct of court hearings)<sup>105</sup>, decisiveness, the quality of written documentation, productivity (for example number of completed cases), organizational and management skills, communication and cooperation skills, and the ability to handle conflicts. Judgments themselves and their immediate environment (such as the taking of evidence) are not subject to assessment.<sup>106</sup> Superiors, usually the president of the court, sometimes with the assistance of the president of the higher court, conduct the assessment. The judges have a right of appeal against the assessment outcome.

It is critically noted that the administrative assessment of judges can compromise judicial independence. "...This is however not yet the case when judicial administration and specifically judicial skills are being assessed. In fact, that is the purpose of the official assessment of judges."..."An official assessment of judges only violates judicial independence if it results in a direct or indirect directive on how the judge is to act or decide in future."<sup>107</sup>

In view of the conflict between various constitutional principles, it is imperative to act on the principle of the unity of the Constitution and aim for the optimal effectiveness of the various constitutional norms and, subject to maintaining proportionality, to achieve a coherence of legal interests.<sup>108</sup> Accordingly, "...the dependence of judges on the justice

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<sup>97</sup> Recommendation CM/Rec[2010]12 of the Committee of Ministers to member states on judges : *independence, efficiency and responsibilities*.

<sup>98</sup> <<http://www.aca-europe.eu/index.php/en/seminars/391-seminar-in-brussels-on-30-november-2009>> (last visited 21 October 2014).

<sup>99</sup> <<http://www.iaj-uim.org/iuw/wp-content/uploads/2013/02/I-SC-2006-conclusions-E.pdf>> (last visited 21 October 2014).

<sup>100</sup> National Center for State Courts (NCSC), Judicial Performance Evaluation (JPE), Resource Guide (<<http://www.ncsc.org>> (last visited 21 October 2014)).

<sup>101</sup> J. M. Singer, 'Knowing is half the battle: A proposal for prospective Performance Evaluations in Judicial Evaluations', 2006-2007 *UALR Law Review* Vol. 29, p. 735 ff.

<sup>102</sup> The latter for example in the state of Utah (<<http://www.judges.utah.gov/boxelder.html>> (last visited 21 October 2014)). On the debate over judge rankings, see for example R. Anderson, 'Distinguishing Judges: An Empirical Ranking of Judicial Quality in the United States Court of Appeals', Pepperdine University School of Law, 2013 *Legal Studies Research Paper Series*, February.

<sup>103</sup> Overview based on L. Jünemann, 'Richterliche Unabhängigkeit und Leistungsbeurteilung, Die Beurteilung richterlicher Tätigkeit im Spannungsverhältnis zur richterlichen Unabhängigkeit – Ein Beitrag aus deutscher Sicht', in Stadelmann et al. (eds.), note 1, p. 55 ff., with further references. See also for example Bieler & Lorse, note 39; G. Steffens, 'Mitarbeiter-Vorgesetzten-Gespräch – Ein Instrument auch für die Justiz?', in W. Hoffmann-Riem (ed.), *Reform der Justizverwaltung*, 1998, p. 212 ff.; Meisenberg, note 8, p. 76 ff.; Riedel (2013), note 39, p. 48 ff.; *ibid.* (forthcoming), note 39, p. 9 ff.

<sup>104</sup> H. Schnellenbach, *Die dienstliche Beurteilung der Beamten und Richter*, 2000, para. 488.

<sup>105</sup> Bundesgerichtshof (BGH), decision of 4 June 2009, RiZ(R) 4/01, para. 33.

<sup>106</sup> W. Schaffer, 'Inhalt und Grenzen der Dienstaufsicht bei Richtern in der BRD', in R. Frank (ed.), *Unabhängigkeit und Bindungen des Richters*, Supplement No 22 to ZSR, 1997, p. 33.

<sup>107</sup> Bundesgerichtshof (BGH), decision of 25 September 2002, RiZ(R) 5/08, para. 15-17, 23. The question is again being intensely debated after a judge was told by his supervisors (criticism with warning) to increase the by comparison considerably below average number of cases that he had dealt with (see H. Forkel, 'Erledigungszahlen unter [Dienst-]Aufsicht!', 2013 *DriZ*, no. 4, p. 132 ff., with further references; F. Wittreck, 'Erledigungszahlen unter [Dienst-]Aufsicht?', 2013 *Richterzeitung*, no. 1, [<<http://richterzeitung.weblaw.ch/rzissues/2013/1/2223.html>> (last visited 21 October 2014)]; *ibid.*, 'Durchschnitt als Dienstpflicht? Richterliche Erledigungszahlen als Gegenstand der Dienstaufsicht', 2012 *NJW*, p. 3287 ff.).

<sup>108</sup> K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 1999, para. 72, with further references; A. Thiele, 'Die Unabhängigkeit des Richters – grenzenlose Freiheit, Das Spannungsverhältnis zwischen richterlicher Unabhängigkeit und Dienstaufsicht', 2013 *Der Staat*, no. 3/13, p. 417 f.; Bieler & Lorse, note 39, p. 360 ff.

management system must be kept to a minimum. Any avoidable (due to it not being necessary to the functionality of justice) exertion of influence on the legal status of judges must not be allowed to happen.”<sup>109</sup>

#### **4.5. Austria<sup>110</sup>**

All judges (except the presidents of the Regional Courts and Higher Regional Courts and the judges of the Highest Court of Justice) are subjected to a performance assessment, conducted by the personnel chambers of the courts acting as independent bodies, after two years in office. Professional and personal characteristics are assessed, with a view to promotion where appropriate. The performance assessments are incorporated into service descriptions. If the performance is rated as ‘excellent’ or ‘very good’, a further assessment is conducted with a view to promotion. Judicial independence, which also pertains to the persons directing the proceedings, finds its limits in administrative supervision.<sup>111</sup>

The experiences are basically positive. With regard to risks, it should be noted that performance assessments may lead to changes in judges’ behavior in relation to judicial activity and therefore may compromise judicial independence. It is also regarded as detrimental in that only a single performance assessment is carried out, unless a change in position is pending, which therefore makes it largely meaningless as regards the remainder of the term of office.

#### **4.6. The Netherlands<sup>112</sup>**

Superiors assess the performances of judges in regular employee appraisal interviews. Individual court judgments are not the subject matter of the meetings. The bases for discussion differ from court to court, but they are due to be standardized in the near future.

Performance assessments of judges are an important quality assurance instrument. The aim is also to make the judges aware of the collective performance of the court. It is also seen as essential that performance goals (output, workload, resources) are agreed in advance – and then act as a basis for the performance assessment. The performance assessment should be conducted as a participative process, i.e. the assessment should not be made without consulting the judge concerned.

Risks relating to judicial independence are perceived in the implicit pressure to deal with cases quickly – which can be detrimental to the quality of the judicial process. However, this pressure existed before the introduction of performance assessments though implicit, and to some extent subliminal. The current absence of adequate rights of recourse is sometimes criticized. However, the experiences are generally viewed as positive.

#### **4.7. France<sup>113</sup>**

French courts are assessed on the basis of statistical data. In addition, a performance assessment of judges is conducted on the basis of the number and degree of difficulty of the cases handled. Normally, the court president conducts the assessment, which serves as an aid in promotion decisions and in disciplinary processes conducted by the Conseil Supérieur de la Magistrature (CSM).

#### **4.8. Italy<sup>114</sup>**

In Italy, judges are evaluated periodically in a procedure relevant to their career status and salaries. In addition, comparative performance assessments are conducted if more than one judge applies for a vacant position. The Consiglio Superiore della Magistratura is responsible in both cases. The assessments include various aspects of judicial activity such as work capacity, productivity, diligence and motivation.

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<sup>109</sup> Bundesverwaltungsgericht (BverwG), ZBR 2006, 349 (350).

<sup>110</sup> Overview based on W. Zinkl, ‘Die Beurteilung richterlicher Tätigkeit im Spannungsverhältnis zur richterlichen Unabhängigkeit – die österreichische Sicht’, in Stadelmann et al. (eds.), note 1, p. 69 ff.; see also Gass & Stolz, note 7, p. 128 f.

<sup>111</sup> See J. Kropiunig, ‘Richterbestellung und richterliche Unabhängigkeit in Österreich’, in R. Frank (ed.), *Unabhängigkeit und Bindungen des Richters*, Supplement No 22 to the ZSR, 1997, p. 38 ff.

<sup>112</sup> Overview based on R. van Zutphen, ‘Richterliche Unabhängigkeit und Leistungsbeurteilung – eine niederländische Sicht’, in Stadelmann et al. (eds.), note 1, p. 75 ff.; see also P. Langbroek, ‘Quality Management in the judicial organisation in the Netherlands’, in CEPEJ (ed.), *Quality management in courts and in the judicial organisations in 8 Council of Europe member States*, 2010, p. 81 ff., with further references.

<sup>113</sup> Overview based on Gass & Stolz, note 7, p. 129 f.; see also the country report in: Stadelmann et al. (eds.), note 1, p. 199 ff.

<sup>114</sup> Overview based on G. Di Federico, ‘Judicial Independence in Italy’, in A. Seibert-Fohr (ed.), *Judicial Independence in Transition*, 2012, p. 357 ff., 371 ff.; see also the country report in Stadelmann et al. (eds.), note 1, p. 219 ff.



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#### 4.9. Empirical Findings

Without being able to make a comprehensive or conclusive evaluation of the performance assessment of judges at present, we have seen that important international institutions that are concerned with judicial management and related issues of quality assurance have addressed the issue of the performance of judges. This underlines the topicality of the subject.

The above overview of the six countries, the USA, Germany, Austria, the Netherlands, France and Italy, also shows that performance assessments of judges are being carried out. Assessment methods that predominate evaluate professional and personal competences, without addressing the judicial decisions themselves. Management bodies within the court or superordinate offices/judicial councils conduct the assessments, and the results are used for both quality assurance and personal development. Judicial independence is regarded as a priority in the conception and conduct of performance assessments. Opportunities to participate in the assessment process and rights of recourse are also seen as being particularly important.

Even if the justice systems of these countries cannot consistently be compared with those in Switzerland (especially judicial appointments for terms of office<sup>115</sup>), the findings can, in principle, be applied to the Swiss system due to the parallels in constitutional provisions on the judiciary.

### 5. Consequences for Performance Assessments in Switzerland

#### 5.1. Basic Assessment

From a general constitutional standpoint, the recording and assessment of the performances of individual judges seems to be permissible subject to certain requirements and, indeed, expedient, subject to those requirements. The assessment results aid internal court management (in particular caseload management and balancing the workload) as well as career development<sup>116</sup> (e.g. with a view to taking on management duties) and are therefore an integral element of quality management. Ultimately, this is meant to consolidate or raise the performance of the court.<sup>117</sup> Additionally, assessment results for individual judges can, when processed appropriately, aid authorities (committees or judicial councils<sup>118</sup>) in (re-)appointment, dismissal or disciplinary procedures.<sup>119</sup>

Adequately publicizing the performance of individual judges aids transparency and makes general discussions around the performance of individual judges that inevitably take place at all levels ('corridor conversations') more objective,<sup>120</sup> thereby contributing to legal harmony in the court system.

Accordingly it seems important that the courts do not obstruct the ongoing discussion on performance assessments, but rather indicate methods themselves and express their views on the assessment process before others decide on it for them.<sup>121</sup>

#### 5.2. Organization

The specific process for performance assessments of individual judges that conform to the Constitution depends, as has been shown, on various elements, in particular the purpose, the subject matter, responsibility, the target group, opportunities to participate, to have a say in the process and rights of recourse.

In relation to the purpose of performance assessments of individual judges, caseload management systems that aim to optimize caseload allocation internally in the courts, based on a quantitative recording of the number of cases<sup>122</sup> handled by the individual judges, seem essential to the courts in general and in view of the requirement of judicial independence not simply reasonable, but necessary. Employee appraisal interviews and status discussions serve to ensure quality

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<sup>115</sup> See Mosimann (2015), note 46, p. 89 ff., with further references.

<sup>116</sup> See in particular Bieler & Lorse, note 39, p. 365 ff.

<sup>117</sup> For a sceptical view in relation to this, see Mosimann (2015), note 46, p. 103.

<sup>118</sup> On the latter in this connection, see Stolz & Gass, note 25, p. 177 f.

<sup>119</sup> See already Lienhard, note 20, para. 8, and the findings in Kettiger, note 10, p. 190; for a more critical view, see D. Kettiger & A. Lienhard, *Möglichkeiten und Grenzen von WOV in der Aargauer Justiz*, legal opinion dated 29 August 2002 (unpublished), p. 28, with further references.

<sup>120</sup> See Raselli, note 20, para. 30.

<sup>121</sup> See also Bandli, note 3, p. 206; see also Walter, note 7, para. 28, who regards quality controlling as a personal task for judges themselves.

<sup>122</sup> Taking account of the differences in weighting the cases.

throughout the court as well as personal development.<sup>123</sup> Performance assessments can additionally aid bodies responsible for (re-)appointment, dismissal or disciplinary procedures: in order to fulfil their tasks, they require relevant information on the performances of the individual judges.<sup>124</sup> However, it appears problematic to use information gathered in performance assessments when deciding on salaries<sup>125</sup>, as this could obviously lead to false incentives. It is clear that the pecuniary aspect is an unsound basis for legitimizing the performance assessment of judges. What is not permitted, according to the opinion represented here, is the reinterpretation of performance assessments as specific, binding performance requirements.<sup>126</sup>

With regard to the subject matter of performance assessments of individual judges, initially only the number and nature of the proceedings involved (personal case statistics including duration of proceedings<sup>127</sup>) seem appropriate in relation to judicial process.

In contrast, further quantitative statistics (such as rates of appeal) seem less suitable, especially where there is a lack of causality (apart from special or obvious cases<sup>128</sup>). A content-based (qualitative) analysis of individual judgments (material quality) or the procedural process (formal quality) is, in contrast, not compatible with judicial independence<sup>129</sup>, unless it has been initiated and carried out by the relevant judges for the purpose of quality assurance or personal development<sup>130</sup> (for example in the form of an exchange of experiences in quality circles, peer-reviews or 360-degree feedback).<sup>131</sup> The required parallel assessment of the quality of the judicial process thus reaches its limits.<sup>132</sup> The subject matter of performance assessment is therefore, primarily aspects of court management (management quality), such as the management of proceedings, personnel management, communication or team skills.<sup>133</sup> These aspects should also be a priority in employee appraisal interviews or status discussions, or in employers' references, and only these aspects can be assessed in surveys, although these surveys must not be related to specific persons.

What always appears to be essential is that various criteria be evaluated in the performance assessment, so as to obtain what is at least an approximate picture of the (measurable) performances of judges.<sup>134</sup> It must not be the case that only the number of concluded cases or the average duration of proceedings is assessed, for example, as this would undoubtedly lead to false incentives. In addition, the different requirements and particularities of judicial activity in the lower and upper courts must be taken into account (such as the type of proceedings, how the facts are established, speed of proceedings and the creation of case law).<sup>135</sup>

As far as responsibility for conducting performance assessments is concerned, it should be noted that performance assessments are an element of management and an essential counterpart to setting objectives. Superiors usually carry out employee appraisal interviews. In a court, this task is usually given (even if these are not superiors in the proper sense) to the president of the plenary court, or in the case of larger courts, of the division concerned.<sup>136</sup> The presidents must be given the corresponding management authority in terms of the judicial organizational law. This will confer on them the required democratic legitimacy and the duty to manage (court management) which is compatible with their role as a *primus inter pares* in the judicial process.<sup>137</sup> As an alternative, collegial models or judicial councils could be considered.

<sup>123</sup> For an opinion against formalised performance assessments, see Mosimann (2015), note 46, p. 105, 107.

<sup>124</sup> On this, see immediately below.

<sup>125</sup> See also Kettiger, note 10, p. 196 f.; Mosimann (2015), note 46, 103; Kiener, note 46, p. 290; Cavelti, note 48, p. 330; CCJE, opinion No. 17, note 95, para. 28, 45, 49.13.

<sup>126</sup> See Sec. 2.3 above.

<sup>127</sup> See also Mosimann (2015), note 46, p. 99 ff.; for a critical view of case statistics, see Walter, note 7, para. 26.

<sup>128</sup> See also Mosimann (2015), note 46, p. 98, 104 f.; CCJE, opinion No. 17, note 95, para. 35.

<sup>129</sup> See for example Poltier, note 20, p. 1028. This is more often the subject of appeal proceedings; see also Mosimann, note 46, p. 98.

<sup>130</sup> For a sceptical view in relation to the purpose as regards changes of function, see Mosimann (2015), note 46, p. 103.

<sup>131</sup> See for example Kettiger & Lienhard, note 119, p. 43; Stolz & Gass, note 25, p. 177, and Walter, note 7, para. 28, emphasize the importance of internal mechanisms; on the topic of 360-degree feedback see M. Warren, 'Enhancing our self-perception: 360-degree feedback for judicial officers', 2011 *Journal of Judicial Administration* (JJA), p. 3 ff.

<sup>132</sup> See also Walter, note 7, para. 27; Tschümperlin, note 47, p. 93.

<sup>133</sup> See on the various areas of competence Sec. 2.1 above.

<sup>134</sup> On the unmeasurable qualities of judges, see Mosimann (2015), note 46, p. 104 f.; Raselli, note 20, para. 20; Walter, note 7, para. 27; Gass & Stolz, note 7, p. 128 f.; see also CCJE, opinion No. 17, note 95, para. 35, 49.6.

<sup>135</sup> On the necessary differentiation between assessment criteria for judges of lower and higher court, see for example N. Knowlton & M. Reddick, 'An informed opinion: Direct Opinion Review and Appellate JPE', in NCSC (ed.) *Trends in State Courts*, 2013, p. 91 ff.

<sup>136</sup> For a sceptical view on the role of superiors, see Mosimann (2015), note 46, p. 104, and pleading instead for a consideration of individual strengths and weaknesses in a collegial exchange, p. 107. In this context, see also H. P. Walter, who calls for personal responsibility in an open discussion within the court (Walter, note 7, para. 28); see also above.

<sup>137</sup> Cavelti, note 48, p. 327 ff.

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Additionally, a distinction must be made between the addressees of the performance assessment data on individual judges. The data primarily aids the court management board in fulfilling its managerial role.<sup>138</sup> Conventional supervisory authorities generally do not need this data – other than in certain exceptional cases, as their supervisory purview concerns the efficiency of the lower court as a whole rather than the performances of individual judges.<sup>139</sup> This must be evaluated differently only in the case of the performance of judges entrusted with the management of the lower courts. The same applies to a greater extent to oversight authorities (normally parliaments or parliamentary supervisory committees), whose supervisory activity is generally characterized by additional distance.<sup>140</sup> Authorities concerned with the preparation of (re-)appointments (parliamentary committees or judicial councils<sup>141</sup>) have the right to additional information.<sup>142</sup> In principle, generalized, condensed information from the court management board on the performances of individual judges should suffice. The bodies responsible for the preparation of (re-)appointments must only receive additional information if an accumulation of not objectively explicable deficiencies occurs.<sup>143</sup> Special rights to information are also necessary in disciplinary or dismissal procedures.

Judges must have appropriate opportunities to have their say and, if necessary, rights of recourse when undergoing a performance assessment. In the case of employee appraisal interviews, this can initially entail a meeting with the supervisory authority, and in the second phase an appeal to an impartial authority. In the case of dismissal or disciplinary procedures, as well as non-re-appointments (where appropriate), existing or yet to be established appeal mechanisms must be used. Here, models involving judicial councils are an obvious option.

### 5.3. Outlook

The performance assessment of judges remains a subject that has not been researched much. Even if the constitutional framework has been roughly defined and various empirical principles have been established abroad in the meantime, further research into performance assessment systems that conform to the constitution is required.

Additionally, Switzerland has little experience of assessing the performance of judges. Carefully conducted practical projects in cantonal and federal courts could provide valuable findings.

Only then can equally carefully developed performance assessment systems which successfully strike the balance between guaranteeing justice and protecting the judiciary begin to be incorporated into judicial organizational law.

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<sup>138</sup> See already the findings in Kettiger, note 10, p. 189; also Raselli, note 20, para. 29.

<sup>139</sup> Calling for the supervisory authorities to have a duty to report failures to achieve annual objectives, see Bandli, note 30, p. 114.

<sup>140</sup> See Sec. 2.1. above; for detail on the differences between oversight and administrative supervision, see Tschümperlin, note 48, p. 233 ff., p. 235 ff.

<sup>141</sup> On the requirements for independent election bodies, see M. Felber, 'Richterwahlen sind nichts für Politiker', *NZZ am Sonntag*, 13 April 2014, p. 19 – a requirement also accentuated by the existence in some cases of appointments of judges by the people.

<sup>142</sup> See already Lienhard, note 20, para. 7, and the findings in Kettiger, note 10, p. 190.

<sup>143</sup> See already Lienhard, note 20, para. 7; see also *ibid.*, note 26, p. 467; for Mosimann (2015), note 46, p. 103, however, it is inconceivable to sanction poor performance assessments by not re-electing the judges concerned.

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## **Annex: Articles from the Swiss Federal Constitution**

### **Article 13** Right to privacy

2

Every person has the right to be protected against the misuse of their personal data.

### **Article 29** General procedural guarantees

1

Every person has the right to equal and fair treatment in judicial and administrative proceedings and to have their case decided within a reasonable time.

2

Each party to a case has the right to be heard.

3

Any person who does not have sufficient means has the right to free legal advice and assistance unless their case appears to have no prospect of success. If it is necessary in order to safeguard their rights, they also have the right to free legal representation in court.

### **Article 30** Judicial proceedings

1

Any person whose case falls to be judicially decided has the right to have their case heard by a legally constituted, competent, independent and impartial court. Ad hoc courts are prohibited.

2

Unless otherwise provided by law, any person against whom civil proceedings have been raised has the right to have their case decided by a court within the jurisdiction in which they reside.

3

Unless the law provides otherwise, court hearings and the delivery of judgments shall be in public.

### **Article 143a** Principles for the allocation and fulfilment of state tasks

5

State tasks must be fulfilled economically and in accordance with demand.

### **Article 126** Financial management

1

The Confederation shall maintain its income and expenditure in balance over time.

### **Article 168** Appointments

1

The Federal Assembly elects the members of the Federal Council, the Federal Chancellor, the judges of the Federal Supreme Court and, in times of war, the Commander-in-Chief of the armed forces ('the General').

### **Article 169** Supervisory control

1

The Federal Assembly supervises the Federal Council and the Federal Administration, the federal courts and other bodies entrusted with the tasks of the Confederation.

### **Article 170** Evaluation of effectiveness

The Federal Assembly shall ensure that federal measures are evaluated with regard to their effectiveness.



## Article 188 Status of the Federal Supreme Court

2

Its organisation and procedure are governed by law.

3

The Federal Supreme Court has its own administration.

## Article 191c Independence of the judiciary

The judicial authorities are independent in the exercise of their judicial powers and are bound only by the law.



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